No. 74

In The

Supreme Court of the United States

October Term, 1959

American Trucking Associations, Inc., et al.,
Appellants,

v.

United States of America and Interstate Commerce Commission,

and

Pacific Motor Trucking Co. and General Motors Corporation,
Appellees.

On Appeal From the United States District Court for the District of Columbia

---

REPLY TO MOTIONS TO AFFIRM

Walter N. Bieneman
2150 Guardian Building
Detroit 26, Michigan

Leroy A. Eschelsen
1111 E Street, N. W.
Washington 4, D. C.

Charles W. Singer
1825 Jefferson Place, N. W.
Washington, D. C.

Peter T. Beardsley
1424 Sixteenth Street, N. W.
Washington, D. C.
Attorneys for Appellants

Wilson - Epes Printing Co. - RE 7-6002 - Washington 1, D. C.

INDEX

TABLE OF CASES

IN THE

Supreme Court of the United States

October Term, 1959

No. 74

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

and

PACIFIC MOTOR TRUCKING CO. AND GENERAL MOTORS CORPORATION,
Appellees.

On Appeal From the United States District Court for the District of Columbia

---

REPLY TO MOTIONS TO AFFIRM

Preliminary

Because we believe the questions involved in this proceeding are of paramount importance in the administration of the Interstate Commerce Act by the Commission, and to the two major regulated industries involved, appellants, pursuant to the provisions of Rule 16(3), file this reply to the separate motions to affirm filed by the Interstate Commerce Commission, and jointly by Pacific Motor Trucking Company and General Motors Corporation.

This Proceeding Involves New Questions of Great Importance in the Administration of the Interstate Commerce Act.

As might be expected, each of the appellees[1] contends that the appeal presents no substantial question. We submit, to the contrary, that a very substantial question is involved by virtue of the Commission's failure to follow this Court's recent decision in the *A.T.A.* case (*American Trucking Assn's., Inc.* v. *U.S.*, 355 U.S. 141). Although appellees admit, as they must, that the Commission's report and order here is not justified, as was its report and order in the *A.T.A.* case, on the basis of "special circumstances" found to exist there, they nevertheless insist that this Court should affirm the Commission's decision. Since, they say, the rail subsidiary (PMT) has been "restricted" to service to points on its rail parent's system,[2] and since the Commission is powerless to invoke the limitations usually imposed in order to assure that motor service rendered by a rail affiliate will supplement, not compete with, that of the rail parent, appellees argue that the Commission has conformed to the statute and the underlying Congressional policy. Acceptance of appellee's argument, which largely begs the questions here involved, will result in the complete emasculation of that policy, intended to severely limit rail opportunity to perform truck operations unrelated to their rail service. This alone, we respectfully submit, justifies the noting of jurisdiction and review on the merits.

---

[1] As noted by the Commission (p. 4), the United States does not defend the Commission's order in this case.

[2] The Southern Pacific's rail system extends for 8,000 miles in the area involved. *Transport Statistics in the U.S.*, 1957 (I.C.C.), Part 1, p. 403. In a masterpiece of understatement, appellees PMT and General Motors characterize the vast increase over the insignificant interstate contract carrier authority previously authorized (Jurisdictional Statement, p. 4) as a "relatively minor extension." (Motion to Affirm, p. 20).

Additionally, the right of the plaintiffs to bring the action, a matter originally raised and vehemently argued by appellees PMT and General Motors before the District Court, but which they now seek to slough off as of no consequence, presents still another important federal question meriting review. If the standing of protestants before the Commission to seek review of its decisions having important bearing on their business life can be so easily defeated as the majority of the court below held, the provisions of the Interstate Commerce Act and the Administrative Procedure Act relating to judicial review do not mean what they plainly say. If, after nearly twenty-five years of federal regulation of interstate motor carriage, this is the law, we submit that this Court should say so. On the other hand, if the court below erred, its holding should be quickly corrected, in order to prevent the misunderstandings otherwise certain to follow.

The Commission's Report and Order Squarely Conflicts With This Court's Recent *A.T.A.* Decision and Should be Reviewed and Set Aside.

None of the appellees finds any comfort in the lower court's ruling that "special circumstances" justify the Commission's action, which ruling is directly contrary to the finding of the Commission that PMT failed to show any "unusual conditions" as justification for the authority granted. Even appellees PMT and General Motors concede that the Commission's grant of authority was not based "on the existence of 'special circumstances.'" (Motion to Affirm, p. 10) All appellees, however, contend that the Commission was powerless to attach the conditions usually imposed in authority issued to rail subsidiaries[3] because, they say, such action would have re-

[3] Including a requirement that the traffic move on rail billing and at rail rates, and either a prior or subsequent rail-haul or so-called key-point restriction, designed to limit the motor operations to service auxiliary to that of the rail parent's.

sulted in converting the proposed PMT contract operations into common carriage. (I.C.C. Motion, p. 7).

As we read the *A.T.A.* decision, this Court has squarely held that the Commission may authorize unrestricted service by railroads or their affiliates *only* where special circumstances justify an exception to the contrary Congressional policy. Although appellees do not appear to seriously contend otherwise, they attempt to avoid the consequences of accepting that interpretation by arguing that the authority granted to the rail subsidiary here is, in reality, restricted in conformance with the requirements of the proviso of § 5(2)(b) of the Act. PMT and General Motors say, at pp. 5-6 of their motion, that the "basic flaw" in our argument is our description of the rights as "unrestricted." The Commission, at page 9 of its motion, contends that "the anti-monopoly objectives of Section 5(2)(b) are satisfied by restricting the service to points which are already served by the railroad. . ." These contentions, though phrased differently, amount to the same thing: that the Commission, by geographically or territorially limiting the authority granted, has conformed to the Congressional policy applicable in cases of this kind. In our Jurisdictional Statement (pp. 15-16) we pointed out the absurdity of this contention. Every application for motor-carrier authority before the Commission involves some territorial limitation and such a "restriction" cannot be construed as limiting the operations here involved to service which is auxiliary and supplemental to that of PMT's rail parent. More than a decade ago, appellees' contention was rejected by the Commission, in *Rock Island Motor Transit Co.—Purchase—White Line*, 40 M.C.C. 457. There (at p. 470) the Commission noted that "there also appears to have developed a tendency in rail-motor acquisition proceedings to treat the *Barker* case restrictions as geographical or territorial only in their intent rather than as substantive limitations upon the character of the *service* which might

be rendered by a railroad or its affiliate under any acquired right." (Emphasis by the Commission) In a somewhat lengthly discussion (pp. 471-472), the Commission completely disposed of the contention that territorial limitation of a rail affiliate's motor authority satisfies the Congressional policy underlying Section 5(2)(b). For brevity, we quote the opening sentence and concluding paragraph of the discussion:

> Despite whatever color of support may be found for the thought that the "approved" operations of the vendee in the *Barker* case, were limited only territorially and not as respects the character of the service which might be rendered, we are convinced there was no such intent and that the reports should not be so construed or applied.
>
> • • • •
>
> In these circumstances and contrasting the language used and the supporting discussion with the much simpler language which would have been adequate if it had been intended to restrict future operations of the vendee only territorially, it is clear that any tendency to treat the *Barker* case as an approval of future rail-motor operations which should be unrestricted except territorially, ignores the clear declaration that certain types of operations are disapproved wherever conducted, and must spring from a misinterpretation of the intent of the reports therein.

Appellees argue that the Commission further "restricted" the grant of authority to the rail subsidiary by reserving the right to impose, in the future, conditions required by the "public interest and national transportation policy." Jurisdictional Statement, p. 71. The utter futility of the "imposition" of this so-called restriction is found in the Commission's report itself, wherein it held that restrictions usually imposed upon railroad truck operations could not here be imposed "for to do so would be to command the holder to render a common-carrier service." Jurisdictional Statement, p. 71. If the Com-

mission's rationale is valid today it will be so tomorrow, or at any future time at which it might seek to exercise the reserved right to impose additional "restrictions." Thus the Commission clearly points the way to railroads seeking to avoid the imposition of auxiliary and supplemental limitations upon their truck service: use the avenue of contract carriage.

Before leaving this point, we comment briefly upon the Commission's rather plaintive statement, at page 10 of its motion, that it cannot compel General Motors' Chevrolet Division to "use the service of existing independent motor carriers" and its complete misstatement, at page 14, of our position.

We would be the first to admit that no shipper, large or small, can be forced to use the service of any carrier. But the Commission, as it has in many cases involving independent motor carriers, could have told General Motors in effect to use the services of existing carriers, or to institute proprietary operations. That is precisely what the Commission told General Motors' Cadillac Division in *Boutell Driveaway Co., Inc., Ext.—Cadillacs and Buicks*, decided April 10, 1959 —— M.C.C. ——. The difference between *Boutell* and this proceeding is that there, in denying that application, the Commission noted that the Cadillac Division of General Motors "has no objection to using the services of a motor carrier merely because it also serves its competitors." Of course, GM's Chevrolet Division, the supporting shipper here, has a contrary policy. While these differing policies are nobody's business so long as they are confined within the GM family, they become a matter of great public concern when the Commission, as it did here and in *Boutell*, draws completely opposite conclusions based thereon. This is particularly true where the result of the Commission's inconsistency, as here, is to bestow favored treatment upon a rail affiliate, despite the contrary Con-

gressional policy. This policy, which the Commission has here consigned to limbo, clearly requires rail applicants for motor authority to meet a heavier burden than that imposed upon independent motor carriers seeking new rights. The Commission so held in the *White Line* case, *supra*, 40 M.C.C. 473-474, and that holding has been noted with apparent approval by this Court on several occasions. See, e.g., *U. S.* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 428 (fn.) and *American Trucking Assn's.* v. *U. S.*, 355 U.S. 141, 151.

The Commission's Motion to Affirm also includes (p. 14) the rather startling statement that "appellants' contention reduces to the assertion, in the face of *American Trucking Assn's.* v. *United States, supra*, that a motor carrier controlled by a railroad may under no circumstances engage in contract carrier operations."

This misinterpretation of our position is completely unjustified. What we have said, we thought rather plainly, was that this Court's *A.T.A.* decision made clear that unrestricted motor service by railroads or their affiliates, whether in common or contract carriage, would not be permitted *except where special circumstances were shown* to justify a departure from the Congressional policy to the contrary. If this correctly reflects what this Court held in the *A.T.A.* case, then the Commission's award of such authority to the rail subsidiary here is altogether unjustified and its misstatement of our position cannot overcome the infirmity of its action.

The Commission's Report and Order Substantially Departs From Its Previous Rulings Respecting Dual Operations.

Appellees contend that the Commission has thoroughly considered the question of dual operations resulting from PMT holding both a certificate and permit from the Commission and Southern Pacific's operations as a rail com-

mon carrier. It is significant that none of them, however, have pointed to any evidence in the record before the Commission to justify the grant of dual authority which it made. The statutory requirement of Section 210 is that a grant of dual authority may not be awarded except "for good cause shown." Whatever the maximum requirements of the quoted phrase, we submit that as a minimum it demands more than a mere assumption by the Commission that the applicant before it will not take advantage of a grant of dual authority to engage in unfair or discriminatory practices which Section 210 is intended to circumscribe.

It is apparent that the Commission's report and order represents a substantial departure from its previous rulings on this issue. The extent to which its report and order departs from, and is contrary to, the policies evidenced by Section 210 of the Interstate Commerce Act is best illustrated by the dissenting expression of Commissioner Murphy (Jurisdictional Statement, p. 79):

> * * * In numerous cases, we have held that the mere opportunity for indulging in the unfair or discriminatory practices contemplated by Section 210 is sufficient to bar approval of dual operations. It would be difficult to visualize a situation in which more opportunity for such practices would be present than in the instant case in which a single shipper will be served by applicant in its dual capacity as a common carrier of general freight and a contract carrier of automobiles and trucks and by the Southern Pacific as a common carrier by railroad. The applicant has wholly failed to show good cause for approval of the dual operations here involved, and the granting of approval under the circumstances of these cases establishes a precedent that will totally destroy the future effectiveness of Section 210.

In an attempt to justify the Commission's findings, appellees point to the fact that PMT's certificates have been restricted against the transportation of automobiles and

trucks here involved. PMT as a common carrier, however, will be in a position to transport general freight (other than automobiles and trucks) upon behalf of General Motors; and Southern Pacific will be in a position to continue to engage not only in the substantial inbound movement of frames and parts used by General Motors, but in the transportation of automobiles and trucks moving to the same consignees authorized to be served by PMT as a contract carrier. Moreover, the fact that the Commission found that prior dual operations have not been shown to have resulted in the evils at which Section 210 is directed is not controlling. As pointed out by Commissioner Murphy, and as found by the Commission in numerous prior decisions, the mere opportunity to engage in discriminatory practices has been found sufficient to warrant disapproval of dual operations. Stated differently, the Commission has said the door must be closed to even the possibility of a carrier serving the same shipper as a contract and common carrier. *P. J. Hamill Transfer Co., Extension—St. Louis County*, 51 M.C.C. 641, *Park-Davis Lines, Inc., Contract Carrier Application*, 51 M.C.C. 787, *Smith and Melton—Extension—Missouri*, 51 M.C.C. 627.

The Court below gave only cursory consideration to the question of dual operations. It therefore remains for this Court to determine whether the Commission may issue a permit to a railroad's motor carrier subsidiary under the circumstances here shown to exist.

The Holding of the Majority Below That Plaintiffs Lacked Standing to Sue is Clearly Erroneous and Requires Correction by This Court.

Having raised the point that plaintiffs lacked standing to sue, and having prevailed on the majority of the court below, appellees PMT and General Motors, in their motion to affirm (p. 2) now blandly suggest, via footnote,

that there is "no occasion for this Court to consider the propriety of such holding." The motion filed by the Commission (p. 5), again by footnote, seems almost to concede that the majority below erred, but at the same time states that the question "is not of general importance." To the contrary, we submit that the broad holding of the court below, if not promptly corrected by this Court, cannot fail to cause great mischief in future proceedings instituted to test the correctness of Commission orders, and those of other administrative agencies. In short, Pandora's box has been opened and this Court will have to close it, if it is to be closed at all. This being so, no good purpose would be served by allowing the original error of the court below to become compounded by additional rulings based thereon before corrective action is taken. If, as we contend, and as the Commission seems to agree, the majority of the court below erred in holding that plaintiffs lacked standing to sue, now is plainly the time for this Court to set the matter straight. We pointed out in our Jurisdictional Statement (p. 17, et seq.) the consequences which will flow from failure to reverse the District Court's holding. Nothing more need be said here.

Respectfully submitted,

WALTER N. BIENEMAN
2150 Guardian Building
Detroit 26, Michigan

LARRY A. ESCKILSEN
1111 E Street, N. W.
Washington 4, D. C.

CHARLES W. SINGER
1825 Jefferson Place, N. W.
Washington, D. C.

PETER T. BEARDSLEY
1424 Sixteenth Street, N. W.
Washington, D. C.
Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the tenth day of July, 1959, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing copies, in duly addressed envelopes, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., and Willard R. Memler, Esq., Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and James Y. Piper, Esq., Assistant General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Pacific Motor Trucking Co., by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Robert L. Pierce and William E. Meinhold, Esqs., 65 Market Street, San Francisco 5, California, and with postage prepaid, to Edward M. Reidy and Thormund A. Miller, Esqs., 205 Transportation Bldg., Washington 6, D. C.

4. On General Motors Corporation, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Henry M. Hogan and Walter R. Frizzell, Esqs., 3044 West Grand Blvd., Detroit 2, Mich., and with postage prepaid, to Beverley S. Simms, Esq., 612 Barr Bldg., 910 17th Street, N. W., Washington 6, D. C.

PETER T. BEARDSLEY